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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is reported at 358 F. Supp. 262, and is set forth in the Appendix at pp. 62-67. The order of the United States Court of Appeals for the Fifth Circuit summarily affirming the dismissal of petitioners' complaint is reported at 475 F.2d 1402 and is set forth in the Appendix at p. 70.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The petition for a writ of certiorari was filed on July 16, 1973 and was granted on April 22, 1974. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May petitioners, who have been fined for violating a municipal loitering ordinance, seek Federal declaratory relief against threatened future arrests and prosecutions under the same ordinance on the ground that it is blatantly unconstitutional?

2. May petitioners, who have been fined for violating an allegedly unconstitutional municipal loitering ordinance, seek Federal equitable relief expunging any record of their arrest and conviction?

Statutes Involved

The Dallas municipal loitering ordinance, Section 31-60 of 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991, is set out in the Appendix to the Petition for Certiorari herein at 8a-10a.

Statement of the Case

On January 18, 1972, petitioners, while driving in an automobile, were arrested and charged with violating the Dallas municipal loitering ordinance (A-13)[1] which provides, in part:

> "It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well being of persons or for the security of property, in the surrounding area."

"Loitering" is defined by the ordinance to include:

> "The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

Prior to trial in the Dallas Municipal Court, petitioners, pursuant to Texas procedure, applied to the Texas Court of Criminal Appeals for a Writ of Prohibition to prevent their prosecution on the ground that the Dallas ordinance was facially unconstitutional, violating the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. On February 21, 1972, the Texas Court of Criminal Appeals denied petitioners' application without opinion (A-7, 29-33).

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[1] "A-__" refers to the separately printed Appendix filed herein.

Petitioners, thereupon, proceeded to trial in the Dallas Municipal Court. After unsuccessfully moving to dismiss the charges against them on the ground that the loitering ordinance was unconstitutional, petitioners entered pleas of *nolo contendere*, and were fined $10 each (A-7-8, 49).

Rather than seek a trial *de novo* in the County Court, in connection with which they would have been subject to a more stringent sentence,[2] petitioners commenced this proceeding in the United States District Court for the Northern District of Texas, Dallas Division, on March 27, 1972, seeking two items of relief (A-9-10).

First, petitioners sought a declaratory judgment that the Dallas municipal loitering ordinance was unconstitutional and could not be utilized to arrest petitioners in the future.[3]

Second, petitioners sought equitable relief expunging any record of their arrest and conviction under the ordinance.

In support of their requests for relief, petitioners presented evidence that between 40-50 loitering prosecutions were commenced each month in Dallas, with a systematic refusal on the part of the Municipal or County courts to

[2] Texas maintains a "two-tier" system of criminal justice similar to the Kentucky system which was before this Court in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Under Texas law, petitioners could have obtained a trial *de novo* by filing a $50 bond. However, they would have been subject to a more severe sentence than the $10 fine imposed by the Municipal Court. No procedure exists in Texas which would have permitted petitioners to have appealed from the Municipal Court without risking a more severe sentence after trial *de novo*. Compare, *Colten* v. *Kentucky*, 407 U.S. 104 (1972) with *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

[3] Petitioners sought no injunctive relief concerning the future application of the loitering ordinance to them, choosing instead to rely upon the less intrusive remedy of declaratory judgment.

deal with the obvious constitutional infirmities raised by the loitering ordinance (A-31-41). In answer to petitioners' interrogatories, respondents admitted to continuing to arrest more than two people per day under the statute (A-68).

Believing itself bound by the stringent guidelines established by the Fifth Circuit in *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972), rev'd *sub nom. Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974), the District Court dismissed petitioners' complaint, without reaching the merits (A-65-67). The Fifth Circuit, following *Becker*, summarily affirmed (A-70). This Court granted certiorari shortly after unanimously reversing *Becker*.

Summary of Argument

1. The courts below explicitly relied upon *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972), in declining to entertain petitioners' complaint. In view of the unanimous reversal of *Becker* by this Court in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974), the most appropriate disposition of this appeal would appear to be a remand to the trial court for reconsideration of the jurisdictional issues in light of the demise of *Becker*. *E.g.*, *Villa* v. *Van Schaick*, 299 U.S. 152 (1936); *Daniel* v. *Goliday*, 398 U.S. 73 (1970); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

2. Under principles enumerated in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) and *Allee* v. *Medrano*, —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974), the District Court should have entertained petitioners' request for prospective declaratory relief. Since no prosecutions were actually pend-

ing against petitioners at the time they sought declaratory relief from threatened future prosecution, considerations of comity did not require dismissal of petitioners' complaint. Compare, *Younger* v. *Harris,* 401 U.S. 37 (1971) with *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974) and *Allee* v. *Medrano,* —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974).

3. In addition to seeking declaratory relief from threatened future prosecution, petitioners were entitled to seek equitable relief expunging any record of their arrest and conviction under a blatantly unconstitutional municipal ordinance. While, ordinarily, such a collateral challenge to the validity of a state criminal conviction would proceed under, and be governed by, Federal *habeas corpus,* the nature of the sentence imposed upon petitioners renders the availability of *habeas corpus* questionable. Accordingly, petitioners may seek to expunge their records pursuant to 42 U.S.C. §1983. No requirement of exhaustion of state judicial remedies exists in cases brought pursuant to 42 U.S.C. §1983, especially when the state remedy required petitioners to risk an increased sentence as the price of seeking Federal review of their constitutional claims. *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

ARGUMENT

I.

The reversal by this Court of the Fifth Circuit authority deemed controlling below necessitates a remand to the trial court for reconsideration in light of the change in the governing law.

The trial court's initial consideration of the jurisdictional issues raised by this case was governed entirely by the stringent guidelines laid down by the Fifth Circuit in the wake of *Younger* v. *Harris,* 401 U.S. 37 (1971). *Becker* v. *Thompson,* 459 F.2d 919 (5th Cir. 1972). Under *Becker,* requests for prospective declaratory relief were to be governed by *Younger,* whether or not criminal prosecutions were actually pending against plaintiffs at the time the Federal action was commenced. Accordingly, both the District Court and the Fifth Circuit summarily dismissed petitioners' complaint without further analysis.

However, in *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974), this Court unanimously reversed the Fifth Circuit and ruled that, in the absence of a pending state prosecution, a civil rights plaintiff possessing the requisite standing is entitled to seek Federal declaratory relief against threatened future prosecutions under an allegedly unconstitutional state statute free from the strictures imposed by *Younger.*

Understandably, neither the trial court, nor the Fifth Circuit, addressed petitioners' complaint in the light of post-*Steffel* jurisprudence. Accordingly, petitioners respectfully suggest that the most appropriate disposition of this appeal calls for a vacation of the dismissals below

and a remand to the trial court for re-consideration of petitioners' complaint in light of the reversal of *Becker* by this Court.[4] *E.g., Villa* v. *Schaick*, 229 U.S. 152 (1936); *Daniel* v. *Goliday*, 398 U.S. 73 (1970); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

II.

Petitioners are entitled to seek Federal declaratory relief against the threat of future prosecution under the unconstitutional Dallas loitering ordinance.

A. *The History and Purpose of the Civil Rights Act of 1871.*[5]

Prior to the Civil War, the Federal courts played virtually no role in enforcing Federal constitutional guarantees against encroachment by state officials. However, post-Civil War legislation effected a virtual revolution in the role of the Federal courts as significant forums for the adjudication of claims that state officials were acting in violation of Federal constitutional guarantees. The establishment of Federal Question jurisdiction in 1875 and the enactment of a broad jurisdictional grant in the area of Civil Rights in 1871 provided Americans, for the first time, with a choice of two parallel judicial systems—state and

[4] Among the issues which would confront the District Court on remand is whether, given the passage of more than two years, a case or controversy continues to exist. Fresh evidence concerning the status and whereabouts of the petitioners and the enforcement patterns of the respondents would be desirable. Cf. *Steffel* v. *Thompson*, 39 L.Ed.2d at 514-15.

[5] Petitioners' recitation of the history and purpose of the Civil Rights Act of 1871 (42 U.S.C. §1983) is drawn primarily from the decisions of this Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Mitchum* v. *Foster*, 407 U.S. 225 (1972); and *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974).

Federal—within which to seek vindication of Federal constitutional rights. Moreover, the decision of this Court in *Ex parte Young*, 209 U.S. 123 (1907), permitted the Federal judiciary to grant effective prospective relief to litigants challenging state action as violative of Federal constitutional norms. See also, *Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419 (March 26, 1974).

The net effect of the post-Civil War jurisdictional legislation and the decision of this Court in *Ex parte Young, supra,* was sustained growth in the role of the Federal judiciary as primary guardians of Federal constitutional rights against governmental encroachment—State or Federal.

Thus, a potential litigant who believes his or her Federal constitutional rights have been or will be violated by state officials acting under color of law, has been granted a valuable choice of forum by Congress. Such a litigant may elect to present his Federal constitutional claims to an appropriate state court, or he may, if he wishes, opt for the protection of the Federal courts. In the instant case, petitioners' attempt to invoke the choice of forum granted to them by the Civil Rights Act of 1871 has been frustrated by the erroneous refusal of the Federal courts to entertain their complaint.

B. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Poses a Classic Case or Controversy.*

Petitioners have each been convicted and fined for violating the Dallas municipal loitering statute. Each understandably fears re-arrest pursuant to respondents' conceded practice of effecting at least two loitering arrests in Dallas each day.

In *Boyle* v. *Landry*, 401 U.S. 77 (1971), this Court ruled that a speculative and unreasonable subjective fear of prosecution would not automatically clothe a litigant with standing to challenge the constitutionality of a state statute. See also, *O'Shea* v. *Littleton*, —— U.S. ——, 42 U.S.L.W. 4139 (Jan. 14, 1974).

However, in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) this Court ruled that an individual to whom a credible threat of arrest had been directed had standing to challenge the constitutionality of the statute on which the threat was predicated.

In the instant case, petitioners have received more than the mere threat of arrest—they have actually been arrested and convicted. Moreover, respondents have conceded that they are continuing to arrest persons under the Dallas loitering ordinance at the rate of more than two per day. Thus, since petitioners' fear of arrest and prosecution is based on objective and credible criteria, they satisfy the *Boyle-Steffel* test and possess standing to seek declaratory relief from future prosecution.[6]

C. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Is Not Barred by Comity.*

Despite the Congressional mandate that civil rights plaintiffs be offered a choice of forum between state and Federal courts, this Court has ruled that considerations of comity may bar a Federal court from interfering with a pending state prosecution, in the absence of bad faith or other extraordinary circumstances justifying immediate

[6] The District Court agreed that petitioners possessed the requisite degree of standing to satisfy the case or controversy requirements established by this Court. 358 F. Supp. at 265 n.4 (A-65).

Federal intervention. *Younger* v. *Harris*, 401 U.S. 37 (1971). In the absence of an actually pending criminal prosecution, however, this Court has recognized that no notions of comity may outweigh the Congressional determination to allow a civil rights plaintiff access to a Federal forum to vindicate his Federal constitutional rights. *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974); *Allee* v. *Medrano*, —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974); *Lake Carriers' Association* v. *MacMullen*, 406 U.S. 498, 509 (1972).

All concede that no prosecutions were pending against petitioners at the time they sought Federal relief against future arrest. Indeed, having arrested and successfully prosecuted petitioners for loitering, Texas had fully vindicated any comity interest which it might advance in connection with the only prosecution in which petitioners were involved. Thus, to the extent petitioners seek relief from future arrests, they in no way impinge upon any comity interest of Texas.[7]

D. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Is Not Barred by Failure to Exhaust State Judicial Remedies.*

It is, of course, no longer open to doubt that civil rights plaintiffs are under no obligation to exhaust state judicial remedies prior to seeking relief in Federal court. *E.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

[7] Petitioners' status is, therefore, readily distinguishable from that of a defendant against whom criminal prosecutions are actually pending who seeks to affirmatively challenge the state statutes involved. *Roe* v. *Wade*, 410 U.S. 113, 126-127 (1973). Whatever comity interests might exist during the pendency of the criminal prosecution, evaporate upon its successful completion.

Petitioners, therefore, were under no obligation to present their Federal constitutional claims to the Texas courts in order to qualify for Federal review. Thus, to the extent petitioners seek declaratory relief from future prosecution, it was erroneous for the District Court to have suggested a requirement of exhaustion of state judicial remedies.[8]

III.

Petitioners are entitled to seek Federal equitable relief expunging any record of their arrest and conviction under the unconstitutional Dallas loitering ordinance.

In addition to seeking Federal declaratory relief from future prosecution, petitioners seek retrospective equitable relief expunging any record of their arrest and conviction. Ordinarily, of course, such a collateral attack upon a state criminal conviction would proceed under, and be governed by, principles of Federal *habeas corpus*. *E.g.*, *Fay* v. *Noia*, 372 U.S. 391 (1963). However, the relatively minor nature of loitering as an offense; the failure to impose any custody upon petitioners;[9] and the precise nature of the relief

[8] Under Texas law, petitioners would have been obliged to risk a substantially more severe sentence as the price of pursuing their original conviction in the state courts. Thus, even if some requirement of exhaustion of state judicial remedies existed (it does not), surely it could not require a civil rights plaintiff to risk an increase in his sentence in order to enjoy the benefits of the Civil Rights Act of 1871. Moreover, petitioners, in fact, unsuccessfully sought to present their constitutional claims to the Texas Court of Criminal Appeals and, thus, satisfied any reasonable exhaustion requirement. See, *infra*, at pp. 15-16.

[9] The maximum penalty for violating the Dallas loitering ordinance is the imposition of a $200 fine. In the absence of any physical custody, or the threat of physical custody, genuine doubt exists as to whether *habeas corpus* relief would be available, even under the modern view of the scope of the writ.

sought,[10] combine to render the availability of post-conviction Federal *habeas corpus* to petitioners extremely doubtful. *E.g.*, *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973). Accordingly, petitioners seek to vindicate their constitutional rights and to clear their records pursuant to the general grant of civil rights jurisdiction to the Federal courts.

Unlike Federal *habeas corpus*, the Civil Rights statutes contain no requirement that a prospective plaintiff exhaust state judicial remedies as a condition precedent to invoking Federal relief. *E.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Thus, the question has become whether a policy of exhaustion ought to invoked in various federal actions based upon the Civil Rights Acts. The decision of this Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961), has answered that question in the negative. There this Court reached the general conclusion, by examining the history of the Civil Rights Acts, that Congress intended the federal remedies to be supplementary to any state remedy that might be available to redress unconstitutional action under color of state law, and that a plaintiff need not exhaust state judicial remedies before suing under the Act. The same conclusion has been reached in a variety of other circumstances. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); see also *Preiser* v. *Rodriguez*, 411 U.S. 475, 477

[10] Even if *habeas corpus* were available in the absence of a threat of physical custody, serious doubt exists as to the power of a *habeas corpus* court to grant affirmative equitable relief expunging a criminal record, since such relief would entail more than the mere release from custody.

(1973). The decision in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) has reaffirmed that principle.

Thus, petitioners were under no obligation to ventilate their constitutional claims in the Texas courts prior to seeking relief from the detrimental effects of a criminal record resulting from arrest and conviction under a blatantly unconstitutional statute.

Moreover, even if one applies traditional notions of exhaustion developed in the context of Federal *habeas corpus* to petitioners' situation, it becomes apparent, first, that no duty to exhaust existed and, second, that petitioners exhausted the only meaningful state remedy open to them.

A. *Petitioners Were Under No Duty to Exhaust State Remedies Which Rendered Them Vulnerable to an Increased Sentence.*

After conviction in the Dallas Municipal Court, petitioners were entitled under Texas law to post a bond of $50 and to demand a trial *de novo* in the appropriate county court.[11] *Tex. Code Crim. Proc. Ann.*, Art. 44.16 (1965). In connection with any such trial *de novo*, the Municipal Court proceeding would, under Texas law, be deemed a nullity, and the presiding judge would be empowered to impose a sentence upon petitioners far more stringent than the $10 fine imposed by the Municipal Court.[12] See generally, *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Not surprisingly, therefore, petitioners elected to forego a trial *de novo* in the county court, rather than risk an increased fine.

[11] Under Texas law, trial *de novo* was the exclusive form of review open to petitioners. No procedure exists for obtaining appellate, as opposed to *de novo*, review of a conviction in Dallas Municipal Court.

[12] Petitioners would have been subject to a fine up to $200 in a trial *de novo*.

In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court ruled that the statutory exhaustion requirements of Federal *habeas corpus* would not preclude *habeas corpus* jurisdiction when a litigant's failure to invoke state appellate remedies was attributable to a credible fear that a more stringent sentence might be imposed upon him by the "appellate" forum. In the instant case, the risk to petitioners in a trial *de novo* was clear. Since under Texas law, the Municipal Court proceedings would be deemed a nullity, the potential sentence after trial *de novo* in the county court was not limited by the strictures of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), but was limited only by the statutory maximum. *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Under the narrow "two-tier" situation exemplified by *Colten*, it would be manifestly unfair to compel Civil Rights litigants to face a Hobson's choice of an increased sentence as the price of exercising their right to present their constitutional grievances to a Federal court. Where, as here, no statutory obligation to exhaust state judicial remedies exists, it would be doubly erroneous to engraft such a restriction upon petitioners who have done nothing more than shun a state *de novo* trial because they feared the imposition of a more stringent sentence.[13]

B. *Petitioners Presented Their Claims to the State Courts.*

Faced with the threat of more stringent sentences after a trial *de novo*, yet desirous of presenting their constitu-

[13] In addition, while a state *de novo* trial might have provided relief from the then pending prosecution, it would have done nothing to protect petitioners against future prosecutions under the statute. Finally, under Texas law, even if petitioners had been successful in a trial *de novo*, no known procedure existed to expunge their record of arrests. See generally, *Hansson* v. *Harris*, 252 S.W.2d 600 (Tex. Ct. Civ. App. 1952).

tional claims to the Texas courts prior to seeking Federal relief, petitioners attempted the only procedural expedient open to them and unsuccessfully sought a Writ of Prohibition in the Texas Court of Criminal Appeals. Under Texas practice, such an application presented the Texas courts with the discretionary opportunity to rule on the constitutionality of the Dallas loitering statute. Unfortunately, the Texas Court of Criminal Appeals declined to entertain petitioners' application. Thus, petitioners in fact exhausted the only state procedure open to them which would not have subjected them to the real threat of substantially more stringent sentences. Having thus presented their claims to the Texas courts, petitioners may not be taxed with a failure to have exhausted state judicial remedies.

C. *The District Court Had Jurisdiction to Order the Expungement of Any Record of Petitioners' Arrest and Conviction Under an Unconstitutional Statute.*

(1) The Dallas Loitering Ordinance Is Facially Invalid.

Laws against vagrancy and loitering are part of the dragnet approach to maintenance of public order. They are used as devices for investigating and preventing crime and for removing "nuisances" and "undesirables" from public places. *See generally,* Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603 (1956). However, the governmental interest in the maintenance of public order must yield to the Constitution when the broad scope of an ordinance is so vague that it:

> "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' United States v. Harriss, 347 U.S. 612, 617, 98 L.Ed. 989, 996, 74 S. Ct. 808, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S. Ct. 736; Herndon v. Lowry, 301 U.S. 242, 81 L.Ed. 1066, 57 S. Ct. 732." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972).

Loitering statutes' crime prevention components improperly aim at suspected or potential conduct, rather than incipient or observable conduct, and thus conflict with the Fourth Amendment requirement that arrests be based upon probable cause. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959); *Papchristou* v. *City of Jacksonville,* 405 U.S. 156, 169 (1972). The vagueness test of *Papachristou* requires first a determination whether the ordinance prohibits conduct in sufficiently precise terms so as to give a reasonably intelligent person notice of what conduct is proscribed. *Id.* at 162.

The language of the Dallas ordinance is too vague and indefinite to enable a citizen to conform his activities to it. The elements of loitering under the ordinance can be established by suspicious circumstances of which the citizen is unaware and for which he is not responsible. As a result, criminal liability can be imposed when no criminal intent exists. The requirement of probable cause for alarm or concern can rest solely in the mind of the beholder, a police officer, or any other person.

The ordinance gives insufficient guidelines for enforcement, permitting arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors required to sustain mere on-the-scene frisks. *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Sibron* v. *New York,* 392 U.S. 40 (1968). The ordinance invites the abuse of pretextual arrests of members

of unpopular groups or persons suspected of engaging in other crimes without sufficient probable cause for them to be arrested for the underlying crime. In summary:

> "To the extent the [ordinance] can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions of due process. Beck v. Ohio, supra; Henry v. United States, supra; Wong Sun v. United States, 371 U.S. 471, 479-482, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, [the ordinance] confers discretion that is simply too unbridled to satisfy due process standards. The 'infirmity' lies in the imprecision of the [ordinance], not the subjective intent of the officers. The Supreme Court has noted, '[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.' Baggett v. Bullitt, supra, 377 U.S. at 373, 84 S. Ct. at 1323." *United States ex rel. Newsome* v. *Malcolm,* 492 F.2d 1166, 1173-74 (2d Cir. 1974).

In *Newsome* the Second Circuit struck down a New York state loitering statute that was more narrowly drawn than the Dallas city ordinance, since the New York statute required the refusal of the individual to give his name and explanation of his conduct. If the New York loitering statute was so clearly unconstitutional on its face under Supreme Court standards, then how much more constitutionally deficient is the Dallas loitering ordinance.

The Dallas ordinance is also overbroad on its face in numerous respects. For example, it is especially offensive that loitering, as defined, can be committed "in, on, or about

any place, public or private [which] term . . . shall include all places distinctively private, such as homes or private residences and apartment houses." Thus, under plain-meaning interpretation, people could be guilty of loitering in their own homes if police thought something suspicious was going on. A vague law, which is also as overbroad as this ordinance is, presents special grounds for federal court adjudication. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *see generally,* Note, 109 U. Pa. L. Rev. 66 (1960).

(2) Federal Courts Possess Power to Order the Expungement of Records of Unconstitutional Arrests and Convictions.

The cases granting expunction of criminal records fall into three distinct categories. The cases of the oldest group were those in which the "petitioner could point to improper dissemination of his records, such as their release to newspapermen or their placement in a 'rogue's gallery' after his acquittal." *Davidson* v. *Dill,* 503 P.2d 157, 161 (Colo. 1972) (en banc). A second group of more recent cases has allowed expungement "where, due to the impropriety of the original arrest, the records serve no legitimate police function." *Id., citing Menard* v. *Mitchell,* 430 F.2d 486 (D.C. Cir. 1970); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Gomez* v. *Wilson,* 323 F. Supp. 87 (D.D.C. 1971); *Wheeler* v. *Goodman,* 306 F. Supp. 58 (W.D.N.C. 1969); *Hughes* v. *Rizzo,* 282 F. Supp. 881 (E.D. Pa. 1968). The final group, which the Colorado court in *Davidson, supra,* found to be compelling, is the line of authority holding that a court should order expungement of an arrest record "when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files."

Id., citing United States v. *Kalish*, 271 F. Supp. 968 (D.P.R. 1967); *Kowall* v. *United States*, 53 F.R.D. 211 (W.D. Mich. 1971); *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971). Thus, "[t]he principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights." *Sullivan* v. *Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973). "The judicial remedy of expungement is inherent and is not dependent upon express statutory provision . . . ." *Menard* v. *Saxbe*, 15 Crim. L. Rep. 2105 (D.C. Cir., April 23, 1974).

A person with a criminal record is in a substantially different position in relation to the police than other citizens. When a crime occurs, those persons with records are more likely to be investigated, and if suspected, more likely to be arrested. To the extent that an arrest record stimulates a greater police involvement in the life of an individual, his privacy is diminished. Note, 49 N.C. L. Rev. 509, 514 (1971).

The collateral legal consequences of a criminal record are well known:

> An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.

Menard v. *Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970) (citations omitted).

The collateral economic consequences are similarly well established. Employers seldom hire individuals having criminal records, especially when there are others available who have not been arrested. Even when the employer pays lip-service to the requirement that he not discriminate on the basis of an arrest record, the potential employee often finds the vacancy filled while the employer "investigates" his arrest. *See* Note, 56 Cornell L. Rev. 470 (1971). One employer has even stated that he could obtain the arrest record of any prospective employee if he were willing to pay to have the data processed. Hess & LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 Crime and Delinquency 494 (1967). For many licensing boards and agencies, absence of a criminal record is one of the criteria employed in evaluating whether or not a candidate is qualified to receive a license. Similarly in many of the professional fields, authorities will frequently consider a criminal record in deciding whether a person should be allowed to practice his chosen profession, and educational opportunities may be withheld from a record holder for the same reason. McGlain, *The FBI's Right to Retain and Disseminate Arrest Records of Persons Not Convicted of a Crime May Be Limited by the First and Fifth Amendments*, 46 Notre Dame Law 825, 830 (1971).

> [W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and dignity is invaded as long as the Justice Department retains

'criminal' identification records, 'criminal' arrest, fingerprints, and a rogue's gallery photograph.

United States v. *Kalish,* 271 F. Supp. 968, 970 (D.C.P.R. 1967). Clearly, where an arrest is not based upon probable cause, but mere alarm, suspicion, or belief, and, in addition, the arrest is made under an unconstitutional city ordinance, the government simply cannot show a compelling state interest in the retention of that record of arrest.

While the assertion of a right to expungement on constitutional grounds is relatively new, the State courts of both Washington and Colorado have recognized it as included within the right of privacy, even before they had the benefit of this Court's guidance in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). *Eddy* v. *Moore,* 487 P.2d 211, 217 (Wash. App. 1971); *Davidson* v. *Dill.* 503 P.2d 157 (Colo. 1972) (en banc).

In the instant case, the petitioners can affirmatively demonstrate their nonculpability, *i.e.,* that their arrest and convictions violated basic constitutional rights. To allow the retention of petitioners' records is, in effect, to allow the punishment, by collateral legal and economic consequences, of petitioners for innocent activity made criminal under an unconstitutional ordinance.

No legitimate governmental interest would be served by so irrational an imposition of punishment. See generally, *Wheeler* v. *Goodman,* 306 F. Supp. 58, 65-66 (W.D. N.C. 1969), remanded for reconsideration in light of *Younger* v. *Harris,* 401 U.S. 987 (1971), reaffirmed on rehearing 330 F. Supp. 1356; *United States* v. *Kalish,* 271 F. Supp. 968 (D.P.R. 1967); *Sullivan* v. *Murphy,* 478 F.2d 938, 970 (D.C. Cir. 1973); *Menard* v. *Saxbe, supra.*

CONCLUSION

For the reasons stated above, petitioners respectfully request that the orders of the Courts below dismissing petitioners' complaint be vacated and that this case be remanded for reconsideration in light of *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974). In the alternative, petitioners urge that the decision of the District Court be reversed.

Respectfully submitted,

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